**U.S. Department of Justice**

*United States Attorney*
*Southern District of New York*

*The Silvio J. Mollo Building*
*One Saint Andrew's Plaza*
*New York, New York 10007*

September 14, 2016

**BY ECF (REDACTED) AND FACSIMILE**

The Honorable P. Kevin Castel
United States District Judge
Daniel Patrick Moynihan Federal Courthouse
500 Pearl Street
New York, NY 10007-1312

**Re: United States v. Gary Hirst, 15 Cr. 643 (PKC)**

Dear Judge Castel:

The Government hereby moves to preclude defendant Gary Hirst from offering the expert testimony of John Shumway regarding the metadata associated with an electronic copy of the Shahini warrant agreement. Hirst's mid-trial disclosure, after the Government opened on the very facts that Hirst's expert now seeks to rebut, is grossly untimely and deeply prejudicial to the Government. Hirst's expert disclosure is untimely for at least two reasons. First, the electronic copy of the warrant agreement about whose metadata Hirst now seeks to elicit expert testimony is one that Hirst had in his possession *as far back as 2010*. Skype chats between Hirst and Gerova's CFO Michael Hlavsa show that Hirst transmitted an electronic copy of the Shahini warrant agreement to Hlavsa via Skype on September 28, 2010 at 11:31 a.m. That same day, at 12:27 p.m., Hlavsa emailed the Shahini warrant agreement, among other documents, to Stephen Weiss, Gerova's outside corporate counsel at the firm Hodgson Russ. At 12:35 p.m., Weiss emailed the warrant agreement and other documents to his partner Shant Chalian, with the message "Do you know anything about this???" According to his expert disclosure, Hirst obtained an electronic copy of the Weiss email to Chalian – and its attachments – from Hodgson Russ on September 7, 2016.[1] But, the attachments to that email, about which Hirst now seeks to offer expert testimony, were documents that Weiss obtained from Hlavsa, who originally obtained them in 2010 *from Hirst*. In other words, the document about which Hirst now seeks to introduce expert analysis is one that *he* was the original source for and which was in his possession, custody and control in

[1] The Government provided a copy of this email and its attachments in a concordance database to the defendant in the discovery productions made in this case in 2015. Since receiving the defendant's notice less than twelve hours ago, the Government has not yet been able to ascertain whether the concordance files contain the metadata necessary for the analysis conducted by Shumway.

2010. There is every reason to believe that this document has been in the Hirst's possession, custody and control since that time, as Hirst's Rule 16 disclosure is replete with emails and other documents dating back to 2010 that were preserved by Hirst.

The second reason that Hirst's expert disclosure is untimely is that Hirst concedes in his expert disclosure, and his accompanying letter to the Court, that (i) he was able to ascertain the create date of the Shahini warrant agreement shortly after obtaining an electronic copy on September 7, 2016 (even prior to consulting with an expert); and (ii) he was aware of the conclusion of his expert on September 11, 2016, the day before the trial started and two days before the parties opened in this case. Only after the parties opened and set forth their positions regarding the timing of various documents, including the warrant agreement, did Hirst transmit expert notice to the Government about the metadata issue. Waiting until the parties open to provide notice of an expert who will rebut statements made in the opening is trial by ambush of the worst sort and the Court should not countenance it. Such a failure to provide timely expert disclosure is an appropriate basis for preclusion. *See, e.g.*, *United States* v. *Ulbricht*, No. 14 Cr. 68 (KBF), 2015 WL 413318, at *5 (S.D.N.Y. Feb. 1, 2015) (precluding experts noticed midtrial); *United States* v. *Blair*, 493 F. App'x 38, 53 (11th Cir. 2012) (disclosure on eighth day of trial was untimely and justified preclusion of expert's testimony); *United States* v. *Holmes*, 670 F.3d 586, 597-99 (4th Cir. 2012) (disclosure on Friday before Monday start date of trial was untimely and justified preclusion of expert's testimony); *United States* v. *Hoffecker*, 530 F.3d 137, 184-87 (3d Cir. 2008) (disclosure three business days before jury selection was untimely and justified preclusion of expert's testimony); *United States* v. *Perry*, 524 F.3d 1361, 1371-72 (D.C. Cir. 2008) (disclosure 48 hours before *Daubert* hearing was untimely and justified preclusion of expert's testimony); *United States* v. *Petrie*, 302 F.3d 1280, 1288 (11th Cir. 2002) (disclosure on Friday before Monday start date of trial was untimely and justified preclusion of expert's testimony); *United States* v. *Mahaffy*, No. 05 Cr. 613 (ILG), 2007 WL 1213738, at *3 (E.D.N.Y. Apr. 24, 2007) (disclosure the day before trial was untimely and justified precluding expert's testimony); *United States* v. *Wilson*, 493 F. Supp. 2d 484, 485-88 (E.D.N.Y. 2006) (disclosure less than one week before trial was untimely and justified precluding expert's testimony).

Although, given the eleventh hour nature of Hirst's disclosure, the Government has not yet consulted with an expert on this issue, there is every reason to believe, given the other evidence in this case, that the conclusion of Hirst's expert is unreliable or that the metadata has been manipulated in some fashion. As the Government stated during its opening statement, the evidence strongly supports the conclusion that Shahini was not recruited into the share issuance scheme alleged in the Indictment until May 2010. The purported consulting agreement between Ymer Shahini and Gerova, which bears a date of January 22, 2010, provides that Shahini was owed an approximately $2 million success fee for introducing the assets of certain Weston funds to Gerova. The principal of Weston will testify at trial that Shahini played no role in making that introduction. Corroborating that testimony is a June 8, 2010 email from John Galanis to Shahini, with the subject line "information on acquisition you brought." The content of the email was a one paragraph description of Weston. Given that Shahini was only provided with details about Weston on June 8, 2010, it is implausible that he was awarded a success fee on January 22, 2010 for introducing Weston to Gerova.

Further, the purported warrant agreement, which transforms Gerova's cash obligation into one settled by warrants, bears of date of March 29, 2010. However, emails obtained pursuant to a search warrant executed on Ymer Shahini's email account make plain that he was not recruited into the scheme until May 2010. On May 21, 2010, for example, Derek Galanis emailed Shahini, with the subject line "A deal awaits." The text of the email is "We should talk my friend." On May 22, 2010, Derek Galanis emailed Ymer Shahini, with the subject line "It's a huge deal with huge cash flow." The text of the email is "All we need is a foreign national we trust which is where you come in my friend." On May 26, 2010, Derek Galanis emailed Shahini with the subject line "Ymer sign and get this back to me asap." The email attached a representation letter that was transmitted to the attorney who issued the opinion that 5,333,333 shares could be issued to Shahini on May 27, 2010 without restriction. On May 27, 2010, Shahini emailed Derek Galanis. The content of the email was "I forgot to mention accorting [sic] to this I'm rich!" Derek Galanis replied, "If we do this just right, my friend, we all may be!" These multiple emails make clear that Shahini was first made aware of and recruited to the scheme in late May 2010. It is therefore simply implausible to believe that the fraudulent documents papering over his receipt of those shares were drafted in early April, at least 6 weeks *before* he was recruited into the scheme.

[redacted]

Having first received the defendant's notice at 11:39 p.m. last night, the Government has understandably not yet consulted with forensic experts regarding the substance of Hirst's expert disclosure. Nonetheless, preliminary efforts to gauge the reliability of the opinions of Hirst's expert suggest significant concerns about the reliability of his conclusions. A basic google search, for example, yields easy to follow instructions to alter the create date of a pdf document.[3]

[redacted]

[3] Notably, even if defense counsel were correct that the warrant agreement was "created" in April 2010 – a fact the Government highly doubts – that would still suggest that the warrant agreement was falsified since the document purports to have been signed in March.

For the reasons set forth above, and in light of the defendant's underhanded efforts to sandbag the Government with belated disclosure, the defendant should be precluded from offering expert testimony on this topic. If the Court is not prepared to preclude the testimony of Hirst's experts on timeliness grounds, the Government respectfully requests the opportunity to submit additional briefing – an opportunity it has been denied by the defendant's late notice. In addition, given the reliability concerns, absent an order precluding the expert testimony, the Government believes a *Daubert* hearing will be required to test the reliability of the methods of Hirst's expert.

Respectfully submitted,

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